

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 16 October 2013

Public Authority: Olympic Delivery Authority
Address: One Churchill Place
Canary Wharf
London
E14 5LN

Decision (including any steps ordered)

1. The complainant requested correspondence between the Olympic Delivery Authority (ODA) and its subcontractor STRI, and also for documents held by STRI about information relating to the reinstatement of Leyton Marsh after its use as a temporary basketball Games-time training venue.
2. The Commissioner's decision is that the ODA is correct to state that information held solely by STRI is not held by the ODA under the terms of the EIR. However, the Commissioner's decision is that the ODA misapplied regulation 13 of the EIR (personal data) in some of the redactions it made to the information that was disclosed to the complainant.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide a new response to the complainant's request for correspondence with STRI with redactions made in accordance with the Commissioner's conclusions.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 15 November 2012, the complainant wrote to the ODA and requested information in the following terms (numbers added by the Commissioner for reference):

"Please supply the following environmental information in connection with the reinstatement of Leyton Marsh following its use for a temporary basketball Games Time Training Venue:

1. All correspondence with contractors STRI.

2. Copies of all documents and records held by STRI relating to the procurement, preparation and installation of turf and any additional seed used in the reinstatement. This would include purchase orders, invoices, correspondence with suppliers, and records of seeding and local seed gathering operations."

6. The ODA responded to the two different items on separate dates. It responded to item 2 on 21 December 2012 and stated that the information was not held because the information was held solely by STRI. The ODA responded to item 1 on 22 January 2013 and provided relevant correspondence but redacted details that it considered exempt under regulation 13.
7. On 30 January 2013 the ODA issued its internal review which upheld the original decision.

Scope of the case

8. The complainant contacted the Commissioner on 6 February 2013 to complain about the way his request for information had been handled.
9. The Commissioner considers that the scope of the case is whether the ODA holds information relevant to item 2 of the request under the terms of the EIR, and whether it correctly applied regulation 13.

Reasons for decision

Environmental Information

10. A request for information should be considered under the EIR instead of the Freedom of Information Act 2000 only if the request itself is concerned with environmental information.
11. The Commissioner concurs with both the complainant and the ODA that this request is concerned with environmental information and so should be handled under the EIR. Specifically, regulation 2(1)(c) of the EIR, as the relevant information would relate to measures that affected the land at Leyton Marsh.

Background

12. The ODA has a contract with Nussli for the reinstatement of the area used for a temporary basketball Games-time training venue in Leyton Marsh. Nussli then subcontracted this project to STRI.

Regulation 3(2)

13. Regulation 3(2) of the EIR states that:

3 (2) For the purposes of these Regulations, environmental information is held by a public authority if the information –

(a) is in the authority's possession and has been produced or received by the authority; or

(b) is held by another person on behalf of the authority.

14. During his investigation the Commissioner has considered both whether the information is held by the ODA in its own records – regulation 3(2)(a) – or whether the information is held by another body on its behalf – regulation 3(2)(b).

3(2)(a)

15. The Commissioner's view is that if information has been received by the ODA, even if it is not the creator of the information, then it is held for the purposes of the EIR.
16. Whilst the request specifically refers to information "held by STRI" the complainant later stated that he considered the request to include any information that had come into the ODA's possession which was held in its own records and not just by STRI on its behalf. In its internal review,

the ODA confirmed that it had adopted this approach when it had conducted its searches and that no information was held directly by the ODA within the scope of the request.

17. The Commissioner disagrees that the scope of the complainant's request encompasses information held in the ODA's own records. The request quite clearly states it is concerned with information "held by STRI", and no mention is made of the ODA's own records.
18. During the course of the Commissioner's investigation it has become apparent that the ODA's Project Manager does hold information in its own records which is relevant to item 2 of the complainant's request. Indeed, some of the correspondence disclosed to item 1 of the request would be within the scope of item 2 if it had not already been disclosed, as it is concerned with the procurement, preparation and installation of turf in the reinstatement project. However, the Commissioner's decision is that the information held by the ODA's Project Manager does not come within the scope of the complainant's request, due to the scope of the request being only for information held by STRI.
19. The Commissioner notes that in its internal review the ODA did provide the complainant with inaccurate information. It stated that it did not hold relevant information in its own records and this is not the case. Whilst the Commissioner's decision is that the ODA would be right to withhold this information to the complainant's request as it does not come within scope, the Commissioner would remind the ODA of the need to be more accurate in its responses to individuals making requests.

3(2)(b)

20. It is the Commissioner's view that if information is held by another organisation on behalf of the ODA, then the ODA holds that information for the purposes of the EIR.
21. In this case the only circumstance in which information would not be held by the ODA by virtue of regulation 3(2) would be where information is only held by STRI on its own behalf.
22. The Commissioner wishes to draw a distinction between information held on behalf of another organisation, and information held in relation to the carrying out of functions on behalf of another organisation. The Commissioner considers that it is possible for information to be held in this latter respect yet still not be held on behalf of that organisation.
23. The information held by STRI relates to functions of the ODA being carried out by STRI. The information relates to an ODA project and it is clear STRI would not hold this information if it had not been awarded a

contract from Nussli to carry out the work on its behalf. However, the Commissioner has made clear that this does not necessarily ensure that the information held by STRI is held on behalf of the ODA.

24. In his request for an internal review the complainant expressed the view that "The works with which the requested documentation is associated were carried out by STRI on behalf of the ODA regardless of whether they were subcontracted, and I believe the information requested is held on behalf of the ODA for the purposes of regulation 3(2)(b)."
25. The Commissioner's view is that the issue of whether STRI are a contractor or subcontractor is not the crucial factor to determine whether the information held by STRI is held on behalf of the ODA. The phrase used in the EIR is "another person" which could conceivably mean a subcontractor.
26. The complainant has argued that the ODA has standard clauses in all its contracts which states that the contractor party "agrees to assist and co-operate with the Client to enable the Client to comply with its information disclosure obligations [under EIR]". However, the Commissioner is of the view that this means that a contracted party is obliged to provide assistance with requests for information, not that all information held by the contracted party is necessarily held on behalf of the ODA.
27. Furthermore, this is not strictly applicable in this case as the ODA does not have a direct contractual relationship with STRI. It has one with Nussli, which in turn has a subcontract with STRI. It is evident that STRI has no direct contractual obligation to hold information on behalf of the ODA and the ODA has no direct control or access to the information held by STRI. The Commissioner has reviewed the ODA contract with its partner Nussli and is satisfied there is no clause which allows the ODA to maintain a degree of access or control over the records of other organisations that enter contracts with Nussli, such as STRI.
28. The Commissioner's decision is that this shows that information held by STRI is not held on behalf of the ODA, even though it is clear that the information relates to a project carried out on behalf of the ODA, as the complainant points out. There is no direct arrangement by which the ODA has access or control over STRI's records and there is no contract in place that grants the ODA rights over the information held in STRI's records. As such, the Commissioner is satisfied that the ODA refused the request correctly on the grounds that under the terms of regulation 3(2)(b) the information is not held by another person on its behalf.

Regulation 13

29. Information is exempt from disclosure on the basis of the exception at regulation 13 if it constitutes third party personal data (i.e. the personal data of anyone other than the individual making the request) and either the first or second condition in regulation 13(2) is satisfied.

Is the requested information personal data?

30. Personal data is defined in section (1)(a) of the Data Protection Act 1998 (DPA) as:

"...data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or likely to come into the possession of, the data controller; and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any person in respect of the individual."

31. The Commissioner has reviewed both the redacted correspondence that was disclosed and the unredacted version. He is satisfied that the information that was redacted is personal data as it is names of staff members of both the ODA and third party organisations. The third party organisations are private companies involved in the delivery of the reinstatement project, and additionally a local pressure group concerned with the project. The information also contains the professional contact details of the companies involved in the project, as well as private information about individuals involved in the pressure group.
32. The Commissioner would note that he identified 26 different individuals who had their personal data redacted. Due to the sizable number of individuals involved, the Commissioner will use general terms but at times will refer to smaller groups within the total when an important distinction needs to be made.

Would disclosure of the information breach any of the data protection principles?

33. The ODA has argued that the names and contact details of its own and third party staff members have been correctly redacted because to disclose them would be unfair to the individuals involved. It stated that this would constitute a breach of the first data protection principle, which states that all processing of personal data should be fair and lawful. In order for the information to be disclosed, it must be shown that disclosure would be fair and that at least one of the conditions from schedule 2 of the DPA has been met.

Reasonable expectations

34. When considering whether disclosure of the personal data would be in the reasonable expectations of the individuals concerned, the Commissioner adopts an objective and balanced approach based on the circumstances of the case, rather than a subjective approach.
35. Having reviewed the redacted information the Commissioner is satisfied that it all relates to the reinstatement project. It consists of email correspondence and accompanying attachments from various stages of the project. The correspondence regarding the local pressure group consists of messages to try and arrange a meeting to discuss matters relating to the reinstatement process. In this context the Commissioner is also of the view that as the information constitutes names and contact details it is not sensitive or delicate in nature.
36. The information for the local pressure group is clearly relating to these individuals' private lives, which carries with it a strong inherent reasonable expectation that the information would not be disclosed. The information relating to the individuals working for private companies or the ODA clearly relates to those individuals' public roles and not their private lives, which does not carry such a strong inherent expectation in withholding the information. However, the Commissioner accepts that disclosing personal data, even that relating to an individual's professional capacity, can be an intrusion on an individual's privacy. Nevertheless, in certain circumstances this intrusion can be justified.
37. The Commissioner has considered the seniority of the individuals concerned who are working in their professional capacity. It is generally accepted that the more senior an individual then the more likely it is that they will have a reasonable expectation for their personal data to be disclosed. Government departments, including the ODA,¹ publish the name and salary details of all employees of Senior Civil Servants (Senior Civil Service level 2 and above), in accordance with the government's commitment to transparency and help set a reasonable expectation for individuals.
38. Despite the ODA's assertion that none of the ODA staff involved are "accountable for executive management in the organisation", the Commissioner notes that a number of the individuals whose details have been redacted are employed in senior positions, and at least one is

¹ For example please see the ODA organogram – <http://data.gov.uk/organogram/olympic-delivery-authority>

named on the organogram previously referenced. As the information relates to a sizeable public project with clear public interest, the Commissioner considers that an employee at this level would have a reasonable expectation that their name and contact details would be disclosed. He would similarly expect more junior members of staff to expect their details to be redacted.

39. However, the Commissioner notes that a number of individuals in less senior positions are involved in public facing roles (e.g. Senior Press Officers, Community Relationship Managers etc.). It is likely that these individuals have already voluntarily disclosed their names and contact details into the public domain. The Commissioner's view is that these individuals would have a reasonable expectation that in most circumstances their name and professional contact details would be disclosed. Given that these individuals are involved in a project of such local significance with substantial costs, the Commissioner considers there is greater weight to the argument favouring the disclosure of these individuals' personal data.
40. It is also apparent from examining the roles of some of the individuals concerned that they are involved in decisions which spend significant amounts of public money. Whilst a number of the individuals work for private companies, they are involved in a sizeable project which is heavily reliant on public funds. The Commissioner considers that such individuals should have a reasonable expectation of the need for public transparency and accountability.
41. As previously noted, a substantial portion of the withheld information relates not to ODA employees but to names and details of its contractors and subcontractors. Whilst the Commissioner acknowledges that these individuals might have a lesser understanding of the EIR and the potential disclosure of information, the Commissioner's view is that the employees of contractor and subcontractor organisations should be aware and appreciate that involvement in public funded projects carries with it a necessary public interest in transparency and accountability. As such, the Commissioner considers that senior employees from the ODA's contractors and subcontractors should have a reasonable expectation that their personal data may be disclosed in appropriate circumstances.
42. The Commissioner has also considered the consequences of disclosure for those individuals working for the local pressure group. Whilst the group does have a local presence and has clearly been involved in trying to influence the ODA's handling of the project, the Commissioner's view is that as the information relates to their private lives and interests the consequences of disclosure are more pronounced, particularly as they did not have a formal role in the decisions taken, the money spent and in the implementation of the project. Individuals have a right to privacy

and a right under article 8 of the European Human Convention on Rights, and the Commissioner considers that this carries with it a strong inherent protection which would be prejudiced by disclosure.

Consequences of disclosure

43. The Commissioner has considered what possible adverse consequences could arise from the redacted information being disclosed. As the information is names and contact details, it could lead to unwarranted contact or correspondence. This could potentially have negative impact upon the individuals concerned. However, the Commissioner notes that the relevant information is individuals' professional contact details, not their personal contact details, which diminishes the weight given to this consequence.
44. The Commissioner considers that not all such contact would be unjustified. As previously explained, a number of individuals are in senior positions, or in public facing roles, or involved in making decisions concerning large amounts of public money. These factors carry a weight of responsibility that justifies greater transparency and increased public scrutiny.
45. There is a possibility that if the names of employees from ODA's contractors were released it might make some private sector organisations reluctant to do business with public authorities. Given that the withheld information is not sensitive the Commissioner's view is that this risk is minimal. In any event, as previously noted, the Commissioner would expect private sector organisations to be aware of the increased need for transparency and accountability in publicly funded projects.

The balance of the rights and freedoms of the data subjects with the legitimate interests in disclosure

46. For personal data to be disclosed there must be a justification for disclosure. For this to occur there must be a legitimate public interest in the information being disclosed.
47. The Commissioner's view is that in this instance there is a legitimate public interest in disclosure. Not only does the information relate to the spending of public money, which carries an inherent interest in transparency and accountability, but it also relates to a project designed to return public land back to its original state after its usage for the recent Olympics. This project is of significant importance to local residents, as well as others with an attachment to the area, and there is a clear public interest in this project being well-managed to ensure that the land is returned in good condition. By disclosing the personal data it

will provide the public with greater insight into which individuals were involved and what actions they took.

Conclusions on fairness

48. The Commissioner considers that there are three different conclusions to be drawn depending on the circumstances of the individuals involved. As previously mentioned, the withheld information is the personal data of 26 individuals and it is not appropriate to draw the same conclusion for them all.
49. Firstly, the Commissioner considers that the individuals involved in the local pressure group should not have their personal details disclosed. The Commissioner acknowledges that they have been involved in the project to a limited degree, and that it would provide the public with greater understanding to know the names of the individuals and what actions they took. However, the Commissioner's view is that this information relates to these individuals' private lives and interests. The consequences of disclosure therefore outweigh any arguments in favour, especially given the group's more limited involvement in the project and that the pressure group's identity and other information relating to it, contained within the requested information, has been disclosed.
50. Secondly, any employee – whether they are an ODA employee or not – who is at Senior Civil Servant level 2 or a private sector equivalent, should have a reasonable expectation that their personal information could be disclosed. The Commissioner does not consider that there is any significant adverse consequence to disclosure which would justify the ODA in withholding the information. In addition the information relates to the individuals' public roles and not their private lives, and there is a legitimate public interest in the information being disclosed. It is well established that senior employees should have a reasonable expectation that personal data such as their name and professional contact details could be released if they are involved in executive decision making for projects which involve significant amounts of public money. Therefore the Commissioner concludes that it would be fair for this information to be disclosed.
51. Thirdly, the Commissioner considers that any employee who held a significant public facing role at the time of the request should similarly have a reasonable expectation that their personal data might be disclosed. The adverse consequences for disclosure for these employees are negligible, as much of the information is already available in the public domain. Indeed, some of the correspondence shows that these employees are in contact with the aforementioned pressure group which maintains an interest in the project. Similarly there is a legitimate public interest in this information being disclosed, and so the Commissioner's

conclusion is again that it would be fair for this information to be disclosed.

52. Fourthly, the Commissioner considers that any remaining employee (i.e. those not in a significantly senior position or in a significant public facing role) would have a reasonable expectation that their personal information would not be disclosed. The Commissioner's view is that it would be unfair for this information to be disclosed as it would be an unwarranted intrusion into the privacy of these individuals.
53. Whilst the Commissioner has decided that it would be fair in some instances for information to be disclosed, it is also essential to demonstrate whether disclosure in those respects meets any of the conditions under schedule 2 of the DPA.

Schedule 2

54. When considering whether the processing of personal data meets any of the conditions under schedule 2 of the DPA the Commissioner focusses on conditions 1 (consent has been given) and 6 (legitimate interests of data controller).
55. The ODA has made it clear that it has not obtained consent from the employees involved, which means that condition 1 has not been met. However, the Commissioner has already shown that there is a legitimate interest in the information being disclosed due to the public interest in the project. Therefore, he finds that condition 6 has been met for those individuals in senior positions or in public facing roles, and that the identified information should be disclosed.

Other matters

56. The ODA provided its final response to the complainant 44 working days after the request was made. In doing so it has breached regulation 5(2) of the EIR. The Commissioner would impress upon the ODA the need to respond to requests within the established timeframe.

Right of appeal

57. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

58. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
59. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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